

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**RE: PHASE I OF THE DEPARTMENT OF)
THE DEPARTMENT OF TELECOMMUNICATIONS)
AND ENERGY INVESTIGATION INTO)
COMPETITIVE MARKET INITIATIVES)**

DTE 01-54

**PHASE I COMMENTS OF THE
DIVISION OF ENERGY RESOURCES**

I. INTRODUCTION

On May 31, 2001 the Department of Telecommunications and Energy ("Department") held a technical session to discuss competitive market issues that present obstacles to the development of a robust electric retail market in Massachusetts. At the conclusion of the technical session the Department invited all interested parties to submit comments regarding this issue. Numerous parties submitted comments, and, subsequent to review of said comments, the Department issued an order opening an investigation into competitive market initiatives ("Department Order").¹ The Department Order directed that specific initiatives related to Default Service (DS) customer information were to be implemented immediately,² and then summarized the comments into three

¹ DTE docket number 01-54.

² The Department Order stated that the Local Distribution Companies (LDCs) were to implement the following initiatives immediately: (1) provide DS customer name, address, and rate class to competitive suppliers (it was determined at the Phase I technical session that this information must be provided to licensed brokers as well) *Department Order at 6-7*; (2) establish a list of "Active Competitive Suppliers" in their respective service territories and provide said list to the Department within 14 days.

general categories of issues that required further investigation, and stated that each category would be addressed in a separate phase of the proceeding.³

Phase I of the proceeding addresses improving competitive supplier access to information regarding DS customers. The Department's objective for Phase I is to develop a set of initiatives that will provide competitive suppliers with access to the appropriate level of DS customer information to facilitate their entry into the Massachusetts marketplace. In addition to having an open discussion regarding the development of a comprehensive set of initiatives, the Department Order issued a specific proposal with respect to customer historic load data and credit information. The Department proposed that each LDC would be required to supply this information to a competitive supplier if a DS customer affirmatively authorized ("opted-in") the Department to release the data.

The Phase I technical conference was held on June 24, 2001. The procedural schedule established at the technical conference set the initial comments deadline for August 10, 2001 and reply comments deadline for August 17, 2001.

The Division of Energy Resources ("DOER" or the "Division") offers the following initial comments relating to those initiatives to be implemented by the LDCs immediately, and in response to issues raised at the Phase I technical session.

³ The Department Order also outlined the LDCs' respective proposals to connect competitive suppliers with customers and identified additional issues raised in the comments with respect to DS and Distributed Generation that would be addressed in other ongoing or future proceedings.

II. DOER COMMENTS

A. Comments on Department Directives to be Implemented Immediately By LDCs

The Department Order set forth two initiatives to be implemented immediately by the LDCs. First, the Order stated that the DS customer name, address, and rate class were categories of information that are not proprietary and must be provided to a competitive supplier that requests the information. Second, the Order directed the LDCs to establish a list of “Active Competitive Suppliers” in their respective service territories and file said list with the Department within 14 days.

DOER believes that the directive to establish a list of “active competitive suppliers” will facilitate communication between retail customers and competitive suppliers. However, DOER suggests that, with respect to each active supplier, the list should identify each customer group (residential/commercial/industrial) that the supplier is serving, and each specific rate class within each group. The Division also recommends that, in order to maximize the utility of the lists, the LDCs should be directed to take a proactive approach in facilitating accessibility and visibility of the lists. The Department Order directs the LDCs to create the list and submit it to the Department. The Order also states that the Department will update its website with the information. However, the order is silent with respect to actions the companies should take to actively promote customer awareness of the existence/identity of the available suppliers (presumably the LDCs will post the updated lists on their respective websites). The result of the directives regarding the active supplier lists is that it puts the burden/responsibility on the retail customer to be proactive in locating the list. Although the effort required to locate the updated lists is minimal, customer inertia and past

negative experiences with outdated competitive supplier lists may result in de facto barriers to the use and value of the lists. As stated, in order to maximize the utility of the list, DOER believes that the LDCs should be required to proactively promote customer awareness of the list as part of a consumer education program. The Division's recommendations with respect to this issue are presented in Section B-II, Customer Education, below.

Regarding the Department directive with respect to the provision of customer information to suppliers, DOER agrees with the Department's finding that the customer name, address and rate class are not proprietary and should be made available to competitive suppliers immediately. However, the Division believes the directive should be expanded to include additional customer information as set forth in Section B-III below.

B. Phase I Technical Session Comments

I. Opt-Out v. Opt-In Procedure

DOER believes that the Department should adopt a procedure for compiling the customer information list that minimizes the affirmative actions a customer must take to authorize information release or to retract an existing authorization. This policy will minimize administrative burdens and maximize supplier-customer contact⁴ thereby facilitating the development of the competitive market. To that end, the Division recommends that the Department adopt an "opt-out" procedure for the development of the customer information lists. Under this method if a

⁴ DOER believes that "opt-in" will result in greater administrative burden (and cost) for LDC's, suppliers and customers alike without significantly adding to consumer protections already available through current laws and regulations. An "Opt-in" requirement will likely guarantee that the vast majority of customers will have few (if any) competitive supply options for the foreseeable future.

customer did not affirmatively state that they wanted their information removed from the list, it would be included and thus provided to competitive suppliers. The “opt-out” program would have an initial opt-out period prior to the development of the initial list,⁵ and then subsequent, periodic, opt-out opportunities.

DOER recognizes that an opt-in procedure may result in some customers being contacted against their wishes because they neglected, or forgot, to opt-out. However, DOER believes that if an appropriate customer education program (see Section B-II) precedes the compilation and distribution of the customer list, this will provide adequate notice to enable customers to take the appropriate actions with respect to opting-out when initially presented with the opportunity to do so. In addition, such customers may opt-out in any subsequent quarterly customer list update. Furthermore, although an opt-out program may result in unwanted solicitations, any potential customer inconvenience is outweighed by the benefits to the development of the competitive market that will result by an opt-out procedure (v. opt-in) that maximizes customer-supplier contact. The opt-out program with customer education and subsequent, recurring opportunities to opt-out, achieves the goals of stimulating the competitive market and providing consumer protection.

With one exception, customer usage information, there are no specific legal constraints on the provision of this information by a LDC to a competitive supplier via an “opt-out” program. The Restructuring Act does not prohibit the release of customer information by a LDC to a competitive supplier. However, the Department regulations do restrict the release of customer usage

⁵ DOER recognizes that initial lists with customer name, address and rate class have already been distributed. Initial list in this context refers to the

information to a competitive supplier, and also restrict the receipt of such information by the supplier. *See 220 CMR 11.04(12)(a) and 11.05(4)(a), respectively.*⁶ The regulations prescribe an “opt-in” procedure for this information in that they require a competitive supplier to obtain affirmative customer authorization to receive usage information. A LDC may only release such information if the supplier has received the customer authorization. DOER recommends that the Department adopt an opt-out policy with respect to the provision of the customer information listed in Section III below. Therefore, the Department regulations (220 CMR 11.04(12)(a) and 11.05(4)(a)) would need to be amended to prescribe an “opt-out” procedure for the provision of historical usage data. As stated, there are no statutory restrictions in the Restructuring Act that would prevent the Department from amending their regulations accordingly.

As stated above, prior to the development and distribution of the customer list, the Department should direct the LDCs to conduct a customer education program that informs customers of the details of the opt-out program and their rights pursuant to it. DOER’s comments regarding customer education are presented below.

list that includes additional customer information that was the subject of the Phase I technical session discussions.

⁶ The Department regulations do not restrict the provision of any other type of information.

II. Customer Education Program

First, the LDC should provide two separate mailings to each customer explaining the DTE order and its consequences for them. The two mailings should be provided in the two monthly bills immediately prior to the bill containing the initial “opt-out” form. The letter should explain what customer information is being given to the supplier, how it is being given to suppliers (password-protected website or mailing list) and for what purpose. Furthermore, the letter should detail that a card will be included with their next electric bill allowing them to “opt-out” of the next round of the program, by returning the card with their next bill payment. The letter should also contain the limits for how the supplier can use the data (no forwarding to other companies, etc.) For customers who pay on the Internet or have electronic withdrawal from accounts, a letter should be mailed to them with a card and return envelope.

Bill stuffers should be used in the bill containing the card and should reiterate the message from the letter previously mailed. The bill stuffer should also contain an 800 number and website from the LDC providing information on the licensed suppliers operating in their service territory (per DTE 01-54). A follow-up bill stuffer with a number customers can call to opt out, should also be sent the month following the initial bill stuffer.

All new customers should receive information on this program when opening an account and such information should be posted on each company’s website homepage.

To maximize the utility of the list the Division recommends that the Department direct the companies to periodically provide a hard copy of the list to customers.⁷ To minimize the cost of this service DOER recommends that the hard copy be provided as an insert in a customer's bill. With regard to the frequency of the provision of the bill insert, DOER recommends that the list should be provided monthly for the first year and quarterly thereafter for a period of five years or until the Department determines that such effort is no longer required.⁸ In addition to the periodic provision of the list, DOER makes the following additional recommendations regarding the active supplier lists.

First, DOER recommends that the Department direct the LDCs to train their customer service representatives regarding the "Active Supplier Lists" to respond to certain basic questions from consumers. Each LDC's customer service representatives should be instructed to offer a supplier list to all default service customers who contact the company (for any reason), and to promptly forward upon request an up-to-date version of the supplier list.⁹ Moreover, each LDC's customer service representatives should be prepared to respond to a limited set of customer questions with specific information from competitive suppliers. For example, it may be appropriate for customer service representatives to identify the names and phone numbers of competitive suppliers that have retail generation service offerings to a particular class of customers (although perhaps only if the list contains five or fewer such suppliers). It might also be appropriate for customer service

⁷ The list should also contain a statement that the suppliers on the list have indicated that they are ready to provide service to customers in the respective service areas. Such a statement could mitigate any lingering consumer skepticism and exasperation with respect to outdated lists.

⁸ DOER also seeks input from the LDCs in reply comments regarding the manner and period in which the hard copy of the list should be provided to customers.

⁹ It should be noted that the DOER hotline has received calls from individuals that have called certain LDCs to inquire as to active suppliers in the LDC's service territory and were referred by the company to the DOER hotline. While DOER is willing to act as an alternate source for this information the Division believes that the LDC service reps should also be able to address any questions regarding competitive suppliers.

representatives to identify competitive suppliers that claim to offer “green” generation service products. The information that a customer service representative would have available to forward to customers should generally be consistent across LDCs, clearly specified in advance, filed with the Department and made available to competitive suppliers.¹⁰

In order to insure that customers receive accurate information, competitive suppliers should be notified of the timetables by which information from them would have to be received by each LDC to support routine updates of the information that customer service representatives would provide to customers. DOER recommends that steps be taken to discourage a LDC’s customer service representatives from offering to customers information that extends beyond that which they have been directed to share with customers.

Second, to maximize the utility of the lists, DOER recommends that each list identify suppliers that are active in more than one service area, and list the specific service areas in which such suppliers are doing business. This information will be valuable to customers with facilities in more than one service area that are interested in contracting with one supplier for all their facilities.

Upon completion of an adequate customer education program and expiration of the appropriate initial “opt-out” period, the Department should direct the LDCs to provide the customer information list to licensed competitive suppliers and brokers that request the list.¹¹ The specific customer information that should be on the list is presented below.

¹⁰ Related to this last recommendation, DOER recommends that the information regarding the existence and location of the list should be provided as a recording when customers are put on hold during calls to the LDCs.

¹¹ It was stated at the Phase I technical session that unregulated (i.e. unlicensed by the Department) energy service companies (ESCOs) should have access to the customer information lists. DOER is against providing the customer information list to unregulated ESCOs. The list should only be

III. Substance of Customer Information List

DOER supports the provision of the maximum amount of customer information to competitive suppliers to enable them to successfully market their products to Massachusetts' retail customers. However, the Division also recognizes that the goal of maximizing competitive supplier access to customer information must be balanced against legitimate legal or policy concerns related customer privacy and/or the proprietary nature of information. Consistent with these policies, DOER recommends that the following customer information be provided to licensed competitive suppliers and brokers:¹²

- ?? Name (of company and contact person, if applicable)
- ?? Address (service and billing)
- ?? Rate class
- ?? Service delivery point identifier (i.e. primary metered, secondary or high tension)(if available)
- ?? Universal identifier (i.e. LDC identifier) (if available)
- ?? Utility account identifier¹³
- ?? Metering read date or cycle
- ?? Meter type
- ?? Historic load data (12 months of usage and demand, if applicable, of the most recent calendar year or rolling 12 months)¹⁴

provided to regulated (i.e. licensed by the Department) companies to enable the Department to have regulatory control over the use of the information (see Section B-VII of this memorandum).

¹² The DOER recommendations are based upon review of the customer information issues raised at the technical session and a review of a white paper prepared for the Edison Electric Institute (Uniform Business Practices for the Retail Energy Market, November 22, 2000, ("EEI Report")). The Restructuring Act does not prohibit the release of customer information by a LDC to a competitive supplier. However, the Department regulations do restrict the release of customer usage information to a competitive supplier, and also restrict the receipt of such information by the supplier. See 220 CMR 11.04(12)(a) and 11.05(4)(a), respectively. The regulations prescribe an "opt-in" procedure for this information in that they require a competitive supplier to obtain customer authorization to receive usage information. A LDC may only release such information if the supplier has received the customer authorization. As described in Section B-VII, DOER recommends that the Department adopt an opt-out policy with respect to the provision of all customer information. The Department regulations are contrary to the Division's recommendation. Therefore, as described in Section B-VII, DOER recommends that the Department amend their regulations to prescribe an "opt-out" procedure for the provision of all the types of customer information listed in Section B-III of this memorandum.

¹³ DOER understands that this "identifier" distinguishes the type of customer – i.e. DS or SOS or Competitive. DOER believes that the provision of this information will help competitive suppliers market their products.

¹⁴ As described in Section B-I, the Department regulations would need to be amended to allow this information to be provided on an "opt-out" basis.

- ?? Load profile reference category, if not based on rate class
- ?? Budget billing data
- ?? Sales tax exemption indicator

The following customer information should not be provided to competitive suppliers on an opt-out basis:¹⁵

- ?? Customer credit information¹⁶
- ?? Interval load data¹⁷

The above information should be provided to all Standard Offer Service (SOS) and DS customers as described below.

IV. Retail Customers on Customer Information List

The customer information list should include Default Service (DS) and Standard Offer Service (SOS) customers served by the LDCs as well as competitive supply customers. One argument against the provision of SOS customer names was that the suppliers were not interested in SOS customers due to their inability to compete with SOS prices. However, recent increases in the cost of SOS may allow suppliers to offer customers comparable, or value added, products that may be able to compete with the SOS. Furthermore, several suppliers specifically expressed an interest in

¹⁵ Customer credit information and interval load data information raise confidentiality and privacy concerns/issues. Therefore, DOER believes that this information should not be provided to competitive suppliers. If a supplier is interested in this information they can negotiate with customers on a case by case basis to gain access to it. The LDCs should not be required to provide it as a general rule.

¹⁶ With respect to credit information there are credit agencies the suppliers can use to gain access to a customers credit report. Furthermore, several suppliers stated at the technical session that they did not need credit information. A representative of several suppliers stated that a filtered list (customers > 30 days in arrears deleted) would be beneficial. DOER is against this suggestion. A customer's payment habits with respect to a utility may not reflect their payment behavior with respect to a competitive supplier. This is counter-productive to the goal of stimulating the competitive market and moving people from DS to a competitive supplier. Therefore, such customers should not be immediately excluded from the list.

¹⁷ DOER believes there is value to providing this information to licensed competitive suppliers/brokers. However, DOER recognizes that some customers may view this information as proprietary (DOER is not taking a position with respect to the proprietary nature of interval data). Therefore, the Division is recommending that the information be made available upon an "opt-in" basis. This places the burden on the supplier to negotiate with the customers to receive the information. However, it should be noted that DOER believes that the risk of harm from releasing interval data to a competitive supplier is minimal for the following reasons: (1) the information is not being publicly disclosed; (2) it is not being released without use restrictions; (3) suppliers enter into agreements with the LDCs that specifically restricts the use of the information for marketing electricity products to the respective customer.

obtaining a list of the SOS customers. Therefore, based upon the changing market conditions, and the suppliers' expressed interest in SOS retail service group, DOER recommends that the customer information list include SOS and DS customer information. If the provision of SOS customer information would delay the production of the DS customer information list DOER recommends that the Department direct the LDCs to first produce the list with respect to DS customers and, as expeditiously as possible, subsequently provide an updated list with the SOS customer information to all licensed competitive suppliers/brokers that originally requested the list.

Within the DS and SOS retail service groups, the Division recommends that the customer information list include all customer groups. To date, there has been minimal interest from competitive suppliers with respect to the residential retail market. The Department's initial order in this proceeding reflects this fact in that the immediate directives related to the provision of customer information did not include residential customers. One reason for the lack of interest in the residential market was that a majority of residential customers were on SOS, and suppliers could not offer products that could profitably compete with the SOS price. As discussed above, the market is changing. Suppliers may be able to offer competitive products to the residential retail market. This is evidenced by the comments of several suppliers at the Phase I technical conference who expressed an interest in obtaining a list of residential customers. Therefore, based upon supplier interest and in keeping with the goal of maximizing supplier-customer contact (thereby maximizing the potential movement of transition retail service customers into the competitive market), DOER recommends including all customer classes on the customer information service list.

The customer information list should be provided to suppliers in the manner described below.

V. Manner/Method of Provision of Customer Information List

DOER recommends that the information be made available via a web based system with sufficient security procedures to ensure that only the relevant licensed competitive suppliers/brokers will be able to access the information. Several suppliers stated that web based provision of the information is preferable to other methods. To provide customers with periodic opportunities to opt-out and provide suppliers with the most useful information, the customer information lists should be updated periodically.

VI. Frequency of Customer Information List Update

DOER recommends that the Department require the LDCs to update the customer information lists quarterly, or as frequently as practicable. Prior to each update the LDCs should be required to distribute an “opt-out” form (see Section B-II of these comments) to customers that are listed on the previous list to provide them an opportunity to have their information removed from the new list. The form can be distributed as a bill insert to minimize administrative costs. Regarding the nature of the updated list, one supplier suggested that the list be comprised of the names of the customers that have opted-out. DOER disagrees with this suggestion. This would create more work for the suppliers in terms of cross checking the old contact list with the new opted-out list and may lead to confusion and result in contacting customers that have recently opted out. The quarterly updates should consist solely of the updated list of names that have not opted-out. From

the date the new list is issued, a supplier would be limited to contacting people on the new list. This would minimize administrative burden (in terms of cross checking lists), and would also minimize the chances of recent opt-out customers being contacted by suppliers.

DOER believes that the provision of a customer list incorporating the above information will provide a benefit to the development of the competitive market. However, there needs to be adequate regulatory safeguards in place to ensure that the information is utilized in a manner consistent with a customer's legitimate privacy/confidentiality concerns. These safeguards should include regulatory provisions that explicitly state the permitted and prohibited uses of the information and penalties to address a violation of the regulations. DOER's comments with respect to these issues are presented below.

VII. Competitive Supplier Use of Customer Information

The customer information list should only be used by licensed competitive suppliers/brokers for marketing purposes. To ensure the information is used only for this purpose, DOER recommends that the Department amend its regulations to include specific restrictions on the use of the information.¹⁸ To accomplish this, DOER suggests that the Department amend 220 CMR 11.05(4)¹⁹ to include a list of specific permitted uses and

¹⁸ Each supplier/broker that requests the customer information list is required by the LDCs to sign an agreement that restricts the use of the information. However, the agreement is between the LDC and the supplier. The Department should to amend its regulations to ensure it has regulatory oversight with respect to the use of the customer information.

¹⁹ Note that DOER is recommending that this section should also be amended to change it from an opt-in procedure for customer historic usage information to an opt-out procedure for all the customer information listed in section B-III of these comments.

prohibitions regarding the use of the customer information lists provided by the LDCs.²⁰

As an additional safeguard to ensure that suppliers are on notice with respect to the specific permitted uses and prohibitions, DOER suggests that the Department amend 220 CMR 11.05(2)(b) to include an additional filing requirement that requires suppliers to provide a statement (signed by an appropriate company official) that the supplier has read 220 CMR 11.05(4), and that it understands and will comply with the requirements of that section. DOER believes that the Department has the authority to amend its regulations in this manner.²¹

To ensure compliance with the amendments, misuse of the customer information would need to be subject to penalties. By amending its regulations in the recommended manner, any violation of the requirements would subject the supplier to the existing penalties provided for in 220 CMR 11.07(4)(c). Therefore, the Department would not need to amend its regulations with respect to penalties for violations of the customer information amendments.

VIII. Electronic Signatures

²⁰ The Department could review the restrictions on the uses of customer information in the LDC-supplier agreements as a guide for development of the regulatory permitted uses and prohibitions. At a minimum the regulations should prohibit the unauthorized sale, disclosure or provision in any other manner, of customer information to a third party, including affiliates, except as required to facilitate energy service to the customer. If the supplier is required to provide customer information to a third party to facilitate energy service, the supplier should be required to obtain the authorization of the customer to do so and should be responsible that such third party uses the information in a manner consistent with all relevant use restrictions.

²¹ The Restructuring Act language is flexible enough to accommodate the regulatory change that would be required. M.G.L. c. 164 §193 (1F)(1) states that the Department shall license all suppliers to do business in the Commonwealth. To administer the license requirement M.G.L. c. 164 §193 (1F)(1)(3) requires all suppliers seeking to do business in the Commonwealth to submit a license application to the Department “subject to rules and regulations promulgated by the department...” This language is sufficiently flexible to allow the Department to amend 220 CMR 11.00 to make the recommended amendments.

DOER strongly supports the use of electronic signatures and submitted comments to that effect in response to the initial May 31, 2001 technical session. A copy of those comments are attached.